

United States
Circuit Court of Appeals
For the Ninth Circuit.

STATE BOARD OF EQUALIZATION OF THE
STATE OF CALIFORNIA,

Appellant,

vs.

L. BOTELER, Trustee in Bankruptcy of the Estate
of Davis Standard Bread Company, a corpora-
tion,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the
United States for the Southern District
of California, Central Division.

FILED

MAR - 5 1942

DAUL P. O'BRIEN,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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111 West Seventh Street,

Los Angeles, California. [1*]

In the District Court of the United States
Southern District of California

Central Division

Chapter X Proceeding
No. 36845-BH-Bkey.

In the Matter of

DAVIS STANDARD BREAD COMPANY,
a corporation,

Debtor.

DEBTOR'S PETITION UNDER CHAPTER X
OF THE NATIONAL BANKRUPTCY ACT

To the Honorable Judges of the District Court of
the United States for the Southern District of
California, Central Division:

The petition of Davis Standard Bread Company,
a California corporation, hereinafter referred to as
the "debtor", respectfully shows:

I.

That the debtor is a corporation, organized and
existing under and by virtue of the laws of the State
of California, and is a citizen and resident of the
State of California within the district and within
the division aforesaid. The debtor is not a railroad,
municipal, insurance, banking corporation, nor a
building and loan association; the debtor is not
engaged, principally or at all, in farming or in the

tillage of the soil, or in agricultural or horticultural pursuits. That during all of the six (6) months immediately preceding the filing of this petition, the debtor was and has been such a resident and citizen, and had, during all of said times, and now has, its principal place of business in the City of Los Angeles, County of Los Angeles, State of California, at which place it was and now is engaged in the business of maintaining and operating a bakery business, in connection with which the debtor operates two bakeries in the City of Los Angeles, where it bakes and produces bakery products and pastries of many kinds, and in connection therewith likewise maintains and operates some fifty-two (52) stores for the sale of its bakery products and other products which it purchases at wholesale and sells through said stores. That in connection with said bakery business the debtor likewise main- [2] tains and operates some two hundred (200) retail delivery routes serviced by trucks and drivers, for the sale of bakery and food products manufactured or purchased by the debtor to its retail customers located in many sections of Southern California. That the debtor, likewise, sells a large quantity of its bakery products to wholesale dealers, and for that purpose maintains certain wholesale routes serviced by employees and trucks of the debtor. The address of the debtor corporation is 120 North Beaudry, Los Angeles, California.

II.

The debtor, petitioner herein, has an authorized capital of One Hundred Thousand Dollars (\$100,000.00), divided into two thousand (2000) shares of common stock of a par value of Fifty Dollars (\$50.00) each. There have been issued sixteen hundred (1600) shares, and no more, of which all are now outstanding.

The names and addresses of the shareholders of the debtor are as follows:

name	shares
R. R. Beamish 120 No. Beaudry Los Angeles, California.....	350
W. M. Beamish 120 No. Beaudry Los Angeles, California.....	350
R. R. Beamish and W. M. Beamish as tenants-in-common 120 No. Beaudry Los Angeles, California.....	500
Ella Davis 139 Delaware Street Woodbury, New Jersey.....	120
Lida D. Kirkbride 226 Delaware Street Woodbury, New Jersey.....	120
Francis B. Davis 54 No. Woodland Ave., Woodbury, New Jersey.....	160

The debtor corporation was organized November 15, 1905 and at all times since the year 1905 has been engaged in the bakery business, and at all such times its capital stock has been closely [3]

held among relatives of John Warner Davis and the two Beamish Brothers above named. That said corporation at all of such times has been well and favorably known in the bakery business, and over said period of years has built up and maintained a reputation for the quality of its products, the stability of its business and the integrity of its officers in the management and operation of said business. That debtor's food products are sold under the tradename of "Perfection" and that said tradename of "Perfection" and Perfection Bakery Products is well and favorably known throughout all of Southern California and in particular throughout the whole of the County of Los Angeles.

III.

That the debtor has no outstanding bonded indebtedness; that no bonds have been issued or are outstanding; that there are no attachments or liens against the property of your petitioner, the debtor; that there are no outstanding judgments against the debtor; that your petitioner has no preferred claims for labor, other than current labor outstanding; that no receiver has been applied for in any court to take over the property or business of the debtor, and no receiver has been appointed.

That there are eight (8) suits or legal actions pending in which Davis Standard Bread Company, the debtor, is a party defendant. That each and every of the claims made and represented to be made by the plaintiffs, in said suits and actions, are

wholly or partially covered by insurance policies indemnifying the debtor from loss or damage resulting from judgments in said action, and in all but three of said actions the amount claimed in the same does not exceed the amount of coverage for which the debtor is protected by insurance. That said actions are entitled, and are brought for the purpose of recovering damages in the amounts, as follows:

Thomas A. Quirk, Plaintiff, against the debtor—damages for an automobile accident; amount claimed One Hundred Fifteen Thousand Two Hundred and Fifty Dollars (\$115,250.00). The debtor has been [4] advised by the attorneys representing the insurance company insuring the debtor against loss by this claim that the plaintiff in said action has not suffered damage in sufficient amount to warrant the recovery of a judgment against the debtor in any amount exceeding the amount of coverage by the debtor's insurer.

N. Tully, against the debtor—claim made for damages occasioned by one of the debtor's products, amount of damages claimed Sixteen Thousand Dollars (\$16,000.00). The debtor is advised by counsel for its insurer, that the amount which may be recovered on said claim will not exceed the coverage afforded the debtor by its products' insurance.

P. Mastin, Plaintiff, against the debtor—claiming damages from one of debtor's products, amount of claim Nineteen Hundred and twenty Dollars (\$1920.00). Covered by product insurance.

Mrs. Malin, Plaintiff, against the debtor, claiming damages from one of the debtor's products, amount claimed Fifty-two Hundred Dollars (\$5200.00)—covered by the debtor's products' insurance.

Rowins, Plaintiff, against the debtor, claiming damages from the use of the debtor's products—amount claimed Twenty-five Thousand Dollars (\$25,000.00); the debtor is advised that the actual damages cannot exceed the amount of the debtor's products' insurance coverage.

L & R Catalano, Plaintiff, against the debtor, claiming damages arising from the use of debtor's products—amount claimed Fifteen Hundred and Fifty Dollars (\$1550.00), covered by debtor's products' insurance.

Wells, Plaintiff, against the debtor, claiming damages occasioned by use of debtor's products—amount claimed Twenty Thousand Dollars (\$20,000.00); the debtor has been advised by counsel representing its insurers that the actual damage and recovery therefrom cannot exceed the amount of coverage afforded the debtor under its products' liability insurance.

Barnett, Plaintiff, against the debtor, claiming damages oc- [5] casioned by the use of debtor's products—amount claimed Twenty Thousand Dollars (\$20,000.00); the debtor has been advised by counsel representing its insurers, that the actual damage and the amount which may be recovered will not exceed the amount of its products' insurance coverage.

That said above-entitled actions in this paragraph mentioned, are pending in either the Superior Court of the State of California, in and for the County of Los Angeles, or in the Municipal Court of the City of Los Angeles, State of California, dependent upon the jurisdictional amount involved.

IV.

That debtor has no outstanding mortgages covering either real or personal property, and has no secured indebtedness outstanding.

V.

That the reasons for the debtor's present financial condition are as follows:

First, the retail stores operated by your petitioner have for many months last past been unable to operate at a profit due to the fact that overhead is more or less constant and that sales have gradually decreased to the point where there is not sufficient gross profit to absorb that overhead as well as that portion of the overhead of the bakery business as a whole, which is charged to the store operation. Several factors have contributed to the decrease in sales of the stores among which have been bread wars and the fact that bread, sold by stores in the markets where petitioner's stores are located, has in many instances been cut in price to the point where petitioner's stores could not meet that competition and price without selling bread and other food products at a loss. In addition to this

situation, a strike has been in progress for more than a year against petitioner, as a result of which petitioner's stores have been picketed, and sales have to a certain extent been affected thereby. General conditions in many districts during the past several months have been such that sales of all products whether those handled by petitioner's stores, or handled in other stores in the markets where petitioner's stores are located, have been very much reduced in volume. All of these factors have to a certain extent affected the gross business done by petitioner's stores, with the result that the petitioner has been losing approximately Ten Thousand Dollars (\$10,000.00) per month.

Second, Due to lack of finances with which to consolidate its bakeries, petitioner for many years has been operating two bakeries, as hereinabove alleged. The operation of two bakeries has resulted in additional overhead and other charges being duplicated in each bakery, which when combined with the reduced margin of profit occasioned by price cutting competition has made it increasingly difficult for petitioner to operate its bakeries at a profit. The consolidation of the two baking plants would result in a very material saving in operating expenses and would work to the advantage of petitioner.

Third, the strike against petitioner's bakery has resulted in widespread picketing, and has to a certain extent contributed to a decreased sale of petitioner's products not only in its stores but also

on the routes and to the customers served by petitioner's drivers and trucks.

Fourth, lack of working capital has made it impossible for petitioner to effect economies in its operations necessary to lower its production and handling cost in order to meet bread wars and price-cutting campaigns which have been commenced and carried on from time to time in the bakery business. The reorganization plan which will be referred to later, contemplates obtaining additional capital and contemplates that certain economies in manufacturing, distribution and sales operation will be accomplished, which will permit petitioner once more to operate at a substantial profit.

The debtor has recently effected and is now affecting economies in its operations so that in the future, and when said economies [7] have been fully worked out, the business can be operated at a substantial profit. If petitioner's stores can be disposed of, and petitioner can be relieved of all liability for the operation thereof, it will be enabled to commence showing a substantial profit immediately, and in this behalf petitioner states that its gross sales have for many years last past exceeded Two Million Dollars per year, and that at the present time and during the summer months, when petitioner's business has reached the lowest ebb in its history, petitioner's sales are still being made at the rate of One Million Seven Hundred and Fifty Thousand Dollars per year, or from Thirty-two to Thirty-five Thousand Dollars per week.

VI.

That the plant and business of your petitioner can be operated at a profit commencing not later than thirty (30) days after the filing of this petition, and can continue to operate at a profit.

VII.

Petitioner alleges that it is unable to pay its debts as they mature; that no bankruptcy proceeding, no debtor proceeding and no proceeding for the appointment of a receiver or a trustee is pending at this time in this or any other court. That a condensed statement of assets and liabilities as of the last available trial balance, to wit: June 30, 1940, is attached hereto marked Exhibit "1", and by reference is incorporated herein as a part of this petition as fully as if set forth at length herein.

VIII.

That among the assets of the debtor are unencumbered real estate, buildings, equipment, raw materials, finished products currently on hand from day to day, accounts receivable, and cash. Petitioner's financial condition as of the date of the filing of this petition is not substantially worse or different from its financial condition as shown by said exhibit numbered "1", with the exception that its cash has been somewhat reduced and its [8] accounts payable have increased; as, for example, of the close of June, 1940, petitioner had no unpaid or delinquent rent on the stores operated

by it, whereas as of the close of business July 31, 1940, petitioner's unpaid rental obligations to its lessors amount to Three Thousand Fifty-four and 56/100 Dollars (\$3,054.56), more or less. This condition has been brought about first by a continuing loss in operations, and second, by reason of the fact that many of petitioner's creditors holding accounts receivable have insisted upon substantial payments of their accounts under the threat of refusing to deliver further materials to petitioner unless said payments were made.

Petitioner is under obligation to The White Motor Company, on a contract for the purchase of trucks, to pay a sum slightly in excess of Two Thousand Dollars (\$2000.00) per week. Petitioner has no present existing delinquency on said contract.

IX.

Your petitioner alleges that relief cannot be obtained under Chapter XI of the National Bankruptcy Act and amendments thereto, and herein shows the facts why such adequate relief cannot be obtained, and herein shows the specific facts constituting the necessity and need for relief under the provisions of Chapter X of said Act.

First: Your petitioner alleges that it does not have at the present time, cash, nor can it raise the cash, to continue the operation of the business and the rehabilitation of the business of the debtor and to continue purchasing raw materials for furnishing food and bakery products to its customers; that

it can raise no funds for the payment of a cash dividend at this time to its creditors by which it could qualify under Chapter XI.

Second: That unless the debtor's business is continued without interruption, it will suffer immediate and irreparable loss which could never be remedied because of the fact that it is required to serve its customers and service its routes and operate its stores daily. [9]

Third: That your petitioner does not desire to scale down its debts to its general creditors, but desires only an opportunity to reorganize its business, to eliminate certain losing departments of said business to effect certain operating economies, to sell real estate, and to obtain additional and new working capital, all as a part and as a preliminary operation to a complete reorganization, for the purpose of paying or providing for the payment of all of its outstanding obligations to its unsecured creditors, and by obtaining an extension of time within which to pay its debts in full without diminution in amount.

X.

Your petitioner is unable to pay its debts as they mature, and desires to effect a reorganization or extension for the purpose of refinancing in order to pay off, refund, or otherwise liquidate all of its debts in full, to retain as much of its assets, including tangibles and intangibles, as may be necessary to the continued successful operation of the business as well as to retain the goodwill of its

customers. That the debtor has elected to, and does elect to take the benefits, for itself and for its creditors, of the provisions of Chapter X of the Acts of Congress relating to bankruptcy.

XI.

That due to the fact that it requires some Fifty Thousand Dollars (\$50,000.00) per month for materials purchased by petitioner with which to operate its business, and by reason of the fact that petitioner's cash is depleted to a point where it has less than Two Thousand Dollars (\$2000.00) as of the date of the filing of this petition, your petitioner represents and alleges that it is necessary that this Honorable Court immediately upon the appointment of a receiver or receivers or a trustee or trustees, authorize such receivers or trustees to continue the operation of said business, and to issue certificates of indebtedness for cash, property, or other consideration to be approved by the Court, upon such terms [10] and conditions, and with such security and priority in payment over existing obligations, secured or unsecured, as may be necessary from time to time in the continued operation of said business, and as in the particular case may be equitable. And, in this behalf, your petitioner further alleges and represents that petitioner has on hand materials sufficient only to continue in the manufacture and production of its bakery products for a period of two or three days, and that unless immediate relief is afforded petitioner, and unless

the receiver, receivers, or trustees appointed or to be appointed by the court in this matter, are authorized to borrow money and/or to obtain credit and to issue certificates of indebtedness, for the purchase of raw materials, petitioner's business will suffer irreparable injury and any reorganization plan which might be submitted will become impossible to consummate. Petitioner states that the drivers of its retail routes work on a percentage basis and are entirely dependent for their livelihood upon such bakery and food products as are supplied to them, and to their trucks daily by petitioner. Any interruption of petitioner's business which results in failure on the part of petitioner to supply said trucks and said drivers with food and bakery products will result in the unemployment of said drivers and of severe financial hardship to them and to the families dependent upon them for support.

XII.

Petitioner further states that negotiations are in progress for the reorganization of petitioner's business, but said negotiations cannot be completed and said plan cannot be submitted to the Court until petitioner's business has first been reorganized and the business placed upon a basis where it can show earnings from month to month, and until certain operations, namely the operation of its stores, has been eliminated and until one parcel of its real estate has been sold and its two baking plants have

been consolidated and enabled to operate under one roof. [11]

XIII.

Your petitioner states that its indebtedness exceeds Two Hundred Fifty Thousand Dollars (\$250,000.00). Your petitioner believes, and, basing its allegation upon such belief, therefore alleges that petitioner's best interests will be served by, and that the many complications of its business require, the appointment of two trustees—one trustee who shall be a disinterested person, and an additional trustee who is an official and director of the corporation and is familiar with the details of petitioner's business. Your petitioner further states and alleges that it desires to and does hereby request that this Honorable court appoint S. H. Smith as the first trustee and as the trustee required by law to be a disinterested person, and that the court appoint as an additional trustee, R. R. Beamish, who is now and for many years last past has been president and a director of petitioner; and in this behalf petitioner represents and alleges that S. H. Smith is a disinterested person and is qualified for many reasons to act as principal trustee of the affairs of petitioner in the above-entitled matter. Petitioner further alleges that for many weeks last past S. H. Smith has been studying the business methods and problems of petitioner, and is now thoroughly familiar with the details of the business and in particular is familiar with and has worked out definite plans for the solution of its financial problems. S. H.

Smith has had many years experience in reorganizing and assisting in reorganizing and refinancing many corporations engaged in many different lines of business. He is a resident of the City of Los Angeles, County of Los Angeles, State of California. He is not a creditor or stockholder of the debtor. He is not now and never has been an underwriter of any of the outstanding securities of the debtor and has not within five years prior to the date of the filing of the within petition been an underwriter of any securities of the debtor; he is not now and has not, at any time within two years prior to the date of the filing of said petition, been a director [12] or officer or employee of the debtor or of any such underwriter; the said S. H. Smith has not any other direct or indirect relationship to, connection with, or interest in the debtor or any such underwriter, and has not for any reason any interest materially adverse to the interests of any class of creditors or stockholders; S. H. Smith is not an interested person as defined by Section 588 of Chapter X of the National Bankruptcy Act.

R. R. Beamish is personally acquainted with all of the creditors of petitioner, and has been actively engaged in managing all of the business affairs of petitioner for many years last past. Petitioner feels that the creditors and the employees of petitioner will feel more secure, and will be more willing to cooperate in the many problems facing the reorganization of petitioner, if R. R. Beamish is appointed as the additional or second trustee to assist

in the management of the affairs of petitioner under the orders and supervision of this Honorable Court.

That a copy of a resolution adopted by the Board of Directors of Davis Standard Bread Company, authorizing the filing of the within petition, duly certified by its Secretary, is attached hereto and marked Exhibit "2" and by reference incorporated as a part of this petition as fully as if set forth herein at length.

Wherefore, your petitioner prays that this Honorable Court makes its order approving this petition as properly filed in good faith under Chapter X of the Acts of Congress relating to Bankruptcy; that the Court find and order that there is no necessity for the appointment of a receiver; that the Court make its order appointing S. H. Smith as one trustee, as a disinterested person, and make its order appointing R. R. Beamish as president, and as a director of petitioner, as an additional trustee, both of said trustees to be appointed with authority to operate said business until further order of this Court; that the Court authorize the trustees, upon such notice as the Court may prescribe, or upon Order to Show Cause, to issue certificates of indebtedness for cash, [13] property, or other consideration from time to time, to be approved by the Court, upon such terms and conditions, and with such security and priority in payment over existing obligations secured or unsecured, as in this particular case may be equitable; that the Court shorten the

time of the notice fixing the date for hearing on any order which it may desire to make authorizing the trustees to issue said certificates of indebtedness for cash, property, or other consideration; that the Court authorize the trustees, upon such notice as the Court may from time to time prescribe and upon cause shown, to lease and/or to sell any property of the debtor whether real or personal, upon such terms and conditions as the Court may approve; that the Court enjoin or stay, until final decree, the commencement or continuation of a suit against the debtor or its trustees or any act or proceeding to enforce a lien upon the property of the debtor; and for all such other and further relief as to the Court may seem proper and meet in the premises.

(Seal)

DAVIS STANDARD BREAD
COMPANY, a corporation
By CHARLES BEAMISH
Secretary
Petitioner

YOUNG & KELLY

By E. L. SEARLE

YOUNG AND KELLEY

634 South Spring St.

Los Angeles, California

TRinity 2661

Attorneys for Petitioner

United States of America,
Southern District of the State of California,
County of Los Angeles—ss.

Charles Beamish, being first duly sworn, deposes and says:

That he is the Secretary of Davis Standard Bread Company, a corporation, and has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to such matters he believes it to be true.

That as Secretary of petitioner corporation, he is authorized to make and verify this petition by the corporation for which he purports to act, a certified copy of the resolution authorizing said [14] action being attached to this petition and referred to by affiant.

(Seal) CHARLES BEAMISH

Subscribed and sworn to before me this 5th day of August, 1940.

(Seal) E. L. SEARLE

Notary Public in and for the County of Los Angeles,
State of California.

[15]

United States of America,
Southern District of the State of California,
County of Los Angeles—ss.

Charles Beamish, being first duly sworn, deposes and says:

That he is the Secretary of Davis Standard Bread Company, a corporation, and has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to such matters he believes it to be true.

That as Secretary of petitioner corporation, he is authorized to make and verify this petition by the corporation for which he purports to act, a certified copy of the resolution authorizing said [14] action being attached to this petition and referred to by affiant.

(Seal) CHARLES BEAMISH

Subscribed and sworn to before me this 5th day of August, 1940.

(Seal) E. L. SEARLE

Notary Public in and for the County of Los Angeles,
State of California.

[15]

EXHIBIT 1

BALANCE SHEET

Davis Standard Bread Company

June 30, 1940

ASSETS

Current Assets

Cash:

Demand deposits	\$ 4,315.28	
For deposit	12,989.81	
Office and branch cash funds	719.18	\$ 18,024.27

Accounts receivable:

Federal Surplus Commodities Corporation food stamps	\$ 419.00	
Customers' accounts	\$8,914.52	
Less reserve	2,033.57	6,880.95
Salesmen's due bills (secured by cash deposit)	1,154.31	8,454.26

Inventories—at lower of cost or market:

Ingredients	\$ 22,208.38	
Wrapping materials	34,490.23	
Specialty purchases	4,977.53	61,676.14

\$ 88,154.67

Other Assets

Accounts receivable from employees:

For purchase of uniforms, cash advances, etc.	3,921.43	\$ 16,046.22
--	----------	--------------

Accounts receivable from officers

387.20

State compensation insurance fund—

5,358.55

expected dividend, 1939 policy

158.29

Sundry accounts receivable

\$303,884.28

Property, Plant and Equipment

Land

\$148,696.85

Buildings, machinery and equipment

155,187.43

Automotive equipment purchased from The White Motor

Company on conditional sales contract

\$379,477.73

Less reserve for depreciation

21,082.10

Deferred Charges

Interest on conditional sales contract

\$ 44,478.68

Insurance

15,816.12

Licenses and taxes

4,357.56

Prepaid rentals

1,190.00

Supplies inventories

9,529.02

75,371.38

\$847,756.22

[16]

LIABILITIES, CAPITAL STOCK AND SURPLUS

Current Liabilities:

Notes payable	
For money borrowed	\$ 26,000.00
For purchases of equipment (other than automotive equipment)	13,020.37
	\$ 39,020.37

Conditional sales contract:

Due The White Motor Company prior to June 30, 1941	\$ 103,034.20
Bank checks outstanding	
Less cash on deposit	9,713.46

Accounts payable:

Trade accounts	\$189,872.79
Salaries, wages and commissions	18,145.61
Pay roll taxes	17,505.65
Employees' deposits	6,427.50
Due company salesmen	2,698.98
Estate of J. W. Davis	724.20
	235,374.73

Accrued:

Federal capital stock tax	440.00
	\$391,582.76

Conditional Sales Contract

Due The White Motor Company	\$407,553.30
Less amount due prior to June 30, 1941 as shown above	107,034.20
	300,519.10

Reserve

For taxes	3,455.01
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Due Officers

R. R. Beamish	\$ 3,248.01
W. M. Beamish	10,540.71
Charles Beamish	4,500.00
	18,288.72

Capital Stock and Surplus

Capital stock:

Par value \$50.00 per share—authorized 2000 shares; issued and outstanding 1600 shares	\$ 80,000.00
Earned surplus	53,910.63

Contingent Liabilities

As endorser on employees' loans from bank
aggregating \$4,590.92.

\$847,756.22

[17]

EXHIBIT 2
RESOLUTION

Be it resolved, that Davis Standard Bread Company, a corporation, for the benefit of its creditors and its stockholders, file forthwith a petition in the United States District Court, for the Southern District of California, Central Division, asking for relief under Chapter X of the Chandler Act of 1938, and praying said Court for permission to rehabilitate itself, either by reorganization or an extension plan later to be formulated;

Be it further resolved, that the vice-president or the Secretary of this corporation be and is hereby authorized to execute said petition, and other papers necessary for the institution and maintenance of said proceeding, in the name of this corporation.

I, Charles Beamish, Secretary of Davis Standard Bread Company, a corporation, hereby certify that at a meeting of the Board of Directors of said corporation held on the 5th day of August, 1940, at which there were present a quorum necessary to do business, the foregoing resolution was passed, adopted and spread upon the minutes of the corporation, and that the same has not, as of this date, been revoked.

(Seal)

CHARLES BEAMISH

Secretary of Davis Standard Bread
Company, a corporation [18]

[Endorsed]: Filed Aug. 5, 1940, 1:25 P.M. R. S. Zimmerman, Clerk. By L. B. Figg, Deputy Clerk.

[Title of District Court and Cause.]

ORDER ADJUDGING DEBTOR BANKRUPT,
DIRECTING THAT BANKRUPTCY BE
PROCEEDED WITH, REFERRING SAID
CAUSE TO A REFEREE, APPOINTING A
RECEIVER AND FIXING TIME AND
PLACE OF HEARING ON TRUSTEES'
ACCOUNTS AND REPORTS AND APPLI-
CATIONS FOR FEES

The above entitled matter having come on for hearing before the undersigned Judge of the above named Court on July 30th, 1941 after several continuances, and the Trustees appearing in person and by their Attorneys, Messrs. William E. Woodroof and Frank C. Weller (Thomas S. Tobin of counsel), and the debtor appearing by its Attorney, Edwin L. Searle, and the Creditors' Committee appearing by Rex Hardy, Lawrence Kelley, and H. P. Hibbard, and testimony having been taken and it appearing to the Court that all attempts at the operation of the business of the debtor have been unsuccessful, that substantial losses have been sustained in said operations, and that said losses will continue in the event of further operation, and it further appearing to the Court that the Plan of Reorganization proposed by the debtor cannot be successfully consummated and that no other Plan of Reorganization can be proposed, and that for the protection of creditors and other parties in interest it is necessary that an Order of Adjudication in Bankruptcy be entered and that bankruptcy be

proceeded with, and that a Trustee be elected or appointed pursuant to Section 44 of the Bankruptcy Act to supersede the Trustees herein appointed, and [19] it further appearing to the Court that for the protection of creditors and parties in interest the operation of the business should continue until such time as a Trustee can be elected or appointed under Section 44 of the Bankruptcy Act, and that for the purpose of such operation and the protection of the bankrupt estate a Receiver in Bankruptcy should be promptly appointed to continue the operation of said business pending the election of a Trustee, and the Court being fully advised in the premises, and there appearing to be no objections thereto;

Now, on motion of Messrs. Frank C. Weller and William E. Woodroof, Attorneys for the Trustees, (Thomas S. Tobin of counsel);

It is ordered that the Davis Standard Bread Company, a corporation, be, and it hereby is, adjudged a bankrupt under the provisions of Section 4, Subdivision A of the Bankruptcy Act of the United States of 1938, and

It is further ordered that the bankruptcy of said debtor be proceeded with pursuant to the provisions of said Act.

It is further ordered that all proceedings in bankruptcy be referred to Benno M. Brink, one of the Referees in Bankruptcy for this District, generally, save and except that the Judge of this Court retains jurisdiction to examine and settle the accounts of L. Boteler and S. H. Smith, Trustees

appointed in the reorganization proceedings herein, and the determination and allowance of fees of such Trustees and their counsel.

It is further ordered that L. Boteler of Los Angeles, California be, and he hereby is, appointed Receiver in Bankruptcy of all property of whatsoever nature and wheresoever located, now owned by or in the possession of said debtor, or of the Trustees appointed in the proceeding in reorganization herein, with the authority to take possession of, hold, preserve, care for, inventory, insure, segregate and remove all assets of the debtor until the appointment and qualification of a Trustee herein, and with the [20] further authority to collect such accounts receivable as are due to said estate; and with further authority to conduct the business and sell the same as a going concern if it can be done with benefit to said estate; and said Receiver is authorized to do all and any such acts, and to take all and any such proceedings as may enable him to forthwith obtain possession of all and any such property, and

It is further ordered that said Receiver be, and he hereby is, specifically authorized, should necessity appear, to sell any of the assets of the bankrupt estate during said Receivership subject to the Order of the Referee authorizing such sale, or sales.

It is further ordered that the duties and compensation of said Receiver are hereby specifically extended beyond those of a mere custodian within the meaning of Section 48 of the Bankruptcy Act, to

embrace the conduct of the business and the marshalling of assets, preparation of inventories, collection, sale and disposition of accounts and notes receivable, and conduct the business of said debtor as hereinbefore specifically authorized; and

It is further ordered that all persons, firms, and corporations, including said bankrupt, and all attorneys, agents, officers, and servants of said bankrupt, herewith deliver to said Receiver all property of whatsoever nature and wheresoever located, including merchandise, accounts, notes and bills receivable, drafts, checks, moneys, securities, and all other choses in action, account books, records, chattels, lands and buildings, life and fire, and all other insurance policies in the possession of them, or any of them, and owned by said bankrupt, and said bankrupt is ordered to forthwith deliver to said Receiver all and any such property now in the possession of said bankrupt; and

It is further ordered that all persons, firms, and corporations, including all creditors of said bankrupt and representatives, agents, attorneys, and servants of all such creditors, and all [21] sheriffs, marshals, and other officers and their deputies, representatives and servants, are hereby enjoined and restrained from removing, transferring, disposing of, or selling, or attempting to in any way remove, transfer, or dispose of, sell, or in any way interfere with any property, assets, or effects in the possession of said bankrupt, or owned by said bankrupt, whether in possession

of any officers, agents, attorneys, or representatives of said bankrupt, or otherwise, and all of said persons are further enjoined from executing or issuing, or causing the execution or issuance or suing out of any Court, any writ, process, summons, attachment, replevin, or any other proceeding for the purpose of impounding or taking possession of or interference with any property owned by or in the possession of said bankrupt, or owned by said bankrupt whether in possession of any agents, servants, or attorneys for said bankrupt, or otherwise, and

It is further ordered that said Receiver is authorized and directed, as provided under the Postal Laws and Regulations of the United States, to receive all mail matter addressed to the above named bankrupt, and

It is further ordered that before entering upon his duties the Receiver shall furnish a bond, conditioned for the faithful performance of his duties, with a good and sufficient surety, or sureties, in the sum of \$50,000.00.

It is further ordered that L. Boteler and S. H. Smith, Trustees under the reorganization proceedings herein, shall close their books of account as of midnight of the day that the Receiver herein shall qualify, and shall thereupon deliver the assets of said business to the said Receiver, and shall thereupon prepare and file herein their final account and report.

It is further ordered that Frank C. Weller and

William E. Woodroof, Attorneys for the Trustees in the reorganization proceedings herein, shall prepare and file herein their final petition for [22] fees herein.

It is further ordered that a hearing will be had before the above entitled Court on September 15, 1941 in Court Room No. 6 Federal Building, Temple and Spring Streets, Los Angeles, California, before Honorable Ben Harrison, at 10 o'clock A. M., or as soon thereafter as the matter may be heard, to consider the current account and report and the final account and report of S. H. Smith and L. Boteler, Trustees in the reorganization proceedings herein, and the applications for fees, if any, on behalf of counsel, and

It is further ordered that the Referee in preparing the Notice for the first meeting of creditors to be held before him, shall include in said Notice the time, place and purpose of the hearing before the undersigned District Judge in said connection, and shall send said Notices to the persons designated under the provisions of Chapter X.

Done at Los Angeles, in the Southern District of California, this 30th day of July, 1941.

BEN HARRISON

Judge of the United States
District Court

[Endorsed]: Filed 3:26 P.M., July 30, 1941. R. S. Zimmerman, Clerk. By M. M. Karcher, Deputy Clerk. [23]

[Title of District Court and Cause.]

ORDER APPROVING APPOINTMENT
OF TRUSTEE

At Los Angeles, in said district, on the 14th day of August, 1941.

L. Boteler of Los Angeles, having been appointed trustee of the estate of the above named bankrupt by the creditors of said bankrupt, as provided in the Act of Congress relating to bankruptcy,

It is ordered that the appointment of said L. Boteler as trustee be, and it hereby is, approved, and the amount of his bond is fixed at Fifty thousand dollars, provided, that if at any time the value of the property of the said estate, in the possession of or under the control of the said Trustee, shall exceed the amount of the said bond, the said Trustee shall forthwith file a petition herein setting forth the facts and praying for an order directing him to file an additional bond in such amount as may be proper.

It is further ordered that all claims filed at or before the first meeting of creditors in this matter be and they are hereby allowed, unless otherwise noted on said claims.

ERNEST R. UTLEY

Referee in Bankruptcy

United States of America,
Southern District of California,
Central Division—ss.

I do hereby certify that the within instrument is a true and correct copy of the original thereof as the same appears of record in my office.

In witness whereof, I hereunto set my hand this 27th day of January, 1942.

BENNO M. BRINK

Referee in Bankruptcy

S

[Endorsed]: Filed Jan. 29, 1942. R. S. Zimmerman, Clerk. [24]

[Title of District Court and Cause.]

TRUSTEE'S PETITION FOR
RESTRAINING ORDER

Honorable Benno M. Brink, Referee in Bankruptcy:

Comes now your petitioner, L. Boteler, and respectfully shows the Referee:

I.

That he is the duly elected, qualified and acting trustee in bankruptcy herein.

II.

That your petitioner, as trustee and receiver, made several unsuccessful efforts to dispose of the assets of this bankrupt corporation by asking for bids on same from various parties whom your peti-

tioner believed would be interested in purchasing the plant of the bankrupt as a going concern; that your petitioner was unable to obtain satisfactory bids for said plant as a going concern, and has now been obliged, in the fulfillment of his duties as prescribed by Section 47-a, Subdv. (1) of the National Bankruptcy Act, to reduce the property of the bankrupt estate to money by means of a piecemeal sale which will involve the junking of the plant and the sale of the property in piecemeal to various and sundry persons. [25]

III.

That the sales which your petitioner proposes to carry out are sales of a purely liquidating nature. That your petitioner is informed that it is the intention of the State Board of Equalization of the State of California to require your petitioner to obtain a Retail Sales Tax Permit for the conduct of said sales and to collect a State retail sales tax from the purchasers on all the property sold by your petitioner under the mandatory provisions of the National Bankruptcy Act, or to hold your petitioner liable therefor.

IV.

That the collection of sales tax in a purely liquidating sale under the Bankruptcy Act of the United States from the purchasers thereof would result in the impeding of the liquidation of this estate by compelling the purchasers to pay three per cent

(3%) more than the purchase price offered for the assets. That your petitioner fears that if he does not comply with the demands of the State Board of Equalization of the State of California and does not take out a California Retail Sales Tax Permit, and does not collect said State retail sales tax, that it may result in his being surcharged on his bond for failure so to do.

That your petitioner does not believe that the State of California has a right to collect a State sales tax on property being liquidated in the United States District Court in bankruptcy where the business is not being conducted at retail, and believes that the State Board of Equalization of the State of California should be restrained from attempting to collect such sales tax. [26]

Wherefore, your petitioner prays that an Order issue requiring the State Board of Equalization of the State of California to show cause, if any there be, why a restraining order should not be made and entered restraining said Board from attempting to compel your petitioner, as trustee in bankruptcy, to take out a Sales Tax Permit and collecting a three per cent (3%) State retail sales tax for the State of California from purchasers of assets of this bankrupt estate in the liquidating thereof, and requiring said Board to establish before this Court its right, if any there be, to require the purchase of such Permit or to collect such tax, and that the trus-

tee be given such other and further relief as the court may deem just and equitable in the premises.

L. BOTELER

Trustee in Bankruptcy

WILLIAM E. WOODROOF &

FRANK C. WELLER

By FRANK C. WELLER

Attorneys for Trustee

United States of America,
Southern District of California,
Central Division,
County of Los Angeles—ss.

L. Boteler, being by me first duly sworn, deposes and says: that he is the Trustee and Petitioner in the above entitled action; that he has heard read the foregoing Petition of Trustee for Restraining Order and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

L. BOTELER

Subscribed and sworn to before me this 27th day of August, 1941.

(Seal) R. M. McLEOD

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Filed Aug. 28, 1941. Benno M. Brink, Referee. Filed Oct. 9, 1941. R. S. Zimmerman, Clerk. [27]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon reading and filing the verified petition of L. Boteler, Trustee in Bankruptcy herein, and good cause therefor appearing,

Now on motion of William E. Woodroof and Frank C. Weller, Attorneys for the trustee, it is

Ordered that the State Board of Equalization of the State of California show cause before the undersigned Referee in Bankruptcy at his Court Room in the United States Post Office and Court House, Los Angeles, California, on the 10th day of September, 1941, at the hour of 2 o'clock, p.m., on said date, or as soon thereafter as counsel can be heard, why said State Board of Equalization of the State of California should not be restrained from attempting to compel the trustee in bankruptcy herein to take out a Sales Tax Permit and collecting a three per cent (93%) State retail sales tax for the State of California from purchasers of the assets of this bankrupt estate, and why said State Board of Equalization of the State of California should not establish before this court its right to require the purchase of such Permit or to collect such tax, and further, why the trustee should not be given such other and further relief as the court may deem just and equitable in the premises. [28]

Done at Los Angeles, in the Southern District of California, this 28 day of August, 1941.

BENNO M. BRINK

Referee in Bankruptcy

[Endorsed]: Filed Oct. 9, 1941. R. S. Zimmerman, Clerk. [29]

[Title of District Court and Cause.]

RESTRAINING ORDER AGAINST THE
STATE BOARD OF EQUALIZATION

The petition of the trustee for a restraining order coming on for hearing before the undersigned Referee in Bankruptcy at his Court Room in the United States Post Office and Court House on the 15th day of September, 1941, at the hour of 2 o'clock, P.M., on said date, the trustee appearing by his Attorneys Messrs. Frank C. Weller and William E. Woodroof (Thomas S. Tobin of counsel), and the State Board of Equalization appearing by Earl Warren, Attorney General of California, Alberta Belford, Deputy, and a Stipulation as to the facts having been entered into, and the Referee being fully advised in the premises,

Finds that the Trustee, L. Boteler, beginning with the second day of his tenure of office as trustee, has been liquidating the assets of the bankrupt; that he has collected, paid, or assumed responsibility for sales tax on all items of merchandise sold by him at retail; that he is now selling and disposing of

equipment and assets belonging to the bankrupt estate to purchasers at private sale for the purpose of liquidation, and is not operating the business of the bankrupt and is not selling such material and equipment as remains in his possession, at retail, but is converting the same into [30] cash under the provisions of Section 47 of the Bankruptcy Act, and is not required to procure a license from the State Board of Equalization to do so, nor to collect, nor to be responsible for sales tax on such sales, and that said sales are being made pursuant to the provisions of the Bankruptcy Act of the United States and to the orders of this Court, and that the State Board of Equalization of the State of California seeks to collect sales tax from said trustee,

Now on motion of Messrs. Frank C. Weller and William E. Woodroof, Attorneys for the trustee (Thomas S. Tobin of counsel), it is

Ordered that the prayer of the trustee's petition be, and it hereby is granted, and the State Board of Equalization of the State of California is hereby restrained and enjoined from attempting to compel the trustee in bankruptcy herein, L. Boteler, to take out a sales tax permit or to collect a three per cent State retail sales tax for the State of California from purchasers of the assets of this bankrupt estate in sales made by the trustee in the liquidation of this bankrupt estate and not made in the operation of the bankrupt's former business.

It is further ordered that the trustee be not

required to collect or pay sales tax on any items of the bankrupt estate sold to purchasers in connection with the liquidation thereof, except such sales as have been made in the usual course of retail business and in the actual operation thereof.

Done at Los Angeles, in the Southern District of California this 19th day of September, 1941.

BENNO M. BRINK

Referee in Bankruptcy.

Approved as to form under Rule 8.

EARL WARREN,

Attorney Gen.

By ALBERTA BELFORD,

Attorneys for State Board of
Equalization

[Endorsed]: Filed Oct. 9, 1941. R. S. Zimmerman, Clerk. [31]

[Title of District Court and Cause.]

PETITION FOR REVIEW

To the Honorable Benno M. Brink, Referee in
Bankruptcy:

The petitioner, State Board of Equalization, respectfully shows:

I.

That the Honorable J. J. Campbell is the duly qualified and acting Administrator of District No. 1, Sales Tax Division, State Board of Equalization, and as such Administrator he makes and files this

Petition for Review for and on behalf of said State Board of Equalization.

II.

That said State Board of Equalization has heretofore filed in this action its claim for sales taxes due the State of California; that thereafter L. Boteler as Trustee in Bankruptcy procured from the Bankruptcy Court an order to show cause directed to the State Board of Equalization of the State of California ordering them to appear and show cause, if any they have, why they should not be enjoined from attempting to enforce the provisions of the California Sales Tax Act against said Trustee in Bankruptcy; that a copy of said order to show cause is attached to and made a part hereof as though specifically set forth herein and marked Exhibit "A"; that [32] at the said time and place designated in said order to show cause the said State Board of Equalization appeared and responded to said order.

III.

That upon said hearing the Referee in Bankruptcy issued against the State Board of Equalization its permanent injunction enjoining the State Board of Equalization from enforcing or attempting to enforce the provisions of the California Retail Sales Tax Act against the Trustee in Bankruptcy of Davis Standard Bread Company, a corporation, Bankrupt; that a copy of said permanent injunction is attached to and made a part hereof as though specifically set forth herein and marked Exhibit "B".

ASSIGNMENTS OF ERROR

The court erred in issuing the said permanent injunction for the following reasons:

1. That said Trustee in Bankruptcy, L. Boteler, was selling on behalf of the bankrupt, Davis Standard Bread Company, a corporation, machinery and equipment at retail within the contemplation of the California Retail Sales Tax Act.

2. That an injunction against the State Board of Equalization will not lie for the reason that the said Trustee in Bankruptcy has under the California Retail Sales Tax Act an adequate remedy at law by paying the tax and suing to recover.

Wherefore, your petitioner prays that said order of the Referee in Bankruptcy be reviewed and reversed, and that said Referee be instructed to modify his order allowing permanent injunction and to review said permanent injunction and [33] to overrule any objection to said claim of the State Board of Equalization and to allow said claim in full, and for such other and further relief as to the court may seem meet and proper.

Dated this 18 day of September, 1941.

J. J. CAMPBELL

Petitioner.

EARL WARREN,

Attorney General of the State
of California,

By ALBERTA BELFORD

Deputy Attorney General,
Attorneys for Petitioner.

State of California,
County of Los Angeles—ss.

J. J. Campbell, being by me first duly sworn, deposes and says:

That he is District Tax Administrator of the State Board of Equalization of the State of California, District No. 1; that he has read the foregoing Petition for Review and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief and as to those matters he believes it to be true.

J. J. CAMPBELL

Subscribed and sworn to before me this 18 day of September, 1941.

(Seal) BETH RICE

Notary Public in and for said County and State.

My Commission Expires June 21, 1942.

Exhibit "A"—see Order to Show Cause, page 35.

Exhibit "B"—see Restraining Order, page 36.

[Endorsed]: Filed Sep. 23, 1941, Benno M. Brink, Referee. Filed Oct. 9, 1941, R. S. Zimmerman, Clerk. [35]

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON PETITION
FOR REVIEW BY STATE BOARD OF
EQUALIZATION.

To the Honorable Benjamin Harrison, Judge of the
Above Entitled Court:

I, Benno M. Brink, one of the Referees in Bankruptcy of this Court, before whom the above entitled matter is pending, do certify to the following:

The State Board of Equalization of the State of California has filed its petition for review from an order made by your referee in this matter on September 19, 1941, in which he restrained and enjoined the said Board from attempting to compel the trustee herein, L. Boteler, to take out a sales tax permit or to collect a retail sales tax for the State of California from purchasers of the assets of this bankrupt estate, on sales made by the said trustee in the liquidation of this estate and not in the operation of the bankrupt's former business. Said order further decreed that the said trustee is not required to collect or pay sales tax on any items of this estate sold to purchasers in connection with the liquidation thereof, as distinguished from sales which were made by this estate in the actual operation of the bankrupt's business.

The Proceedings

On August 28, 1941, the trustee filed his petition [36] herein for an order to show cause (1) requir-

ing the State Board of Equalization of the State of California to show cause why an order should not be made restraining said Board from attempting to compel the said trustee to take out a sales tax permit or to collect a retail sales tax for the State of California from purchasers of assets of this estate in the liquidation thereof, and (2) requiring said Board to establish before this Court its right to require the said trustee to take out such permit or to collect such taxes.

An order to show cause was duly issued on said petition on August 28, 1941, and the same, after being once continued, came on for hearing before your referee on September 15, 1941, at 2:00 P. M., the trustee appearing by his counsel, William E. Woodruff and Frank C. Weller (Thomas S. Tobin appearing of counsel), and the State Board of Equalization appearing by its counsel, Hon. Earl Warren, Attorney General of the State of California, (Alberta Belford, Deputy Attorney General, appearing of counsel). The case was duly presented and thereafter, on September 19, 1941, your referee made the order which is here complained of.

The Questions Presented

The petition for review in this case presents these two questions:

1. Is the trustee in this matter subject to the provisions of the California Retail Sales Tax Act, so far as the liquidation of the assets of this estate is concerned?

2. Does the trustee in this case have an adequate remedy at law, in the situation here presented, by paying the tax here in question and then [37] suing to recover the same, and, if so, does this Court, nevertheless, have authority to enjoin the State Board of Equalization from attempting to compel the said trustee to take out a sales tax permit or to collect the sales tax here involved?

The Evidence

The undisputed facts are that this proceeding began under Chapter X of the Bankruptcy Act; that for a time the business of the bankrupt was operated by Chapter X trustees, of whom L. Boteler, the present trustee, was one; that thereafter an order of adjudication was entered and that thereupon Mr. Boteler was appointed as receiver in bankruptcy; that for a brief period he operated the business of the bankrupt as such receiver; that thereafter he was appointed trustee in bankruptcy and that he is now serving as such trustee; that he is not operating the bankrupt's business; that the assets of this estate include the furniture, fixtures, equipment and other miscellaneous items of the wholesale and retail bakery business formerly operated by the bankrupt; that the trustee offered the same for sale at public sale in the referee's Court, but that no satisfactory bid was received therefor, and that he was thereupon authorized by the Court to

sell the same at private sale, either in one lot or piece by piece, whichever way might appear to be most advantageous to this estate; that pursuant to said order the trustee has sold a number of items to various and sundry persons and that he expects to liquidate the balance of the items hereinbefore mentioned in the same manner; that the State Board of Equalization has [38] demanded that the trustee take out a retail sales tax permit and that he collect and remit the sales tax prescribed by the California Retail Sales Tax Act on sales made by him of the aforesaid items; that the trustee is of the opinion that in the liquidation of the assets of this estate he is not subject to the provisions of the said Act, but that he fears that if he does not collect the tax prescribed thereby, and it is later determined that he should have done so, that he might be surcharged for his failure so to do.

Findings, Conclusions and Order of the Referee

Your referee found the facts to be as hereinabove set forth and he concluded therefrom that while this estate is liable for the payment of sales taxes on sales made in the operation of the bankrupt's business, that the trustee in this case, in the liquidation of the assets of this estate, is not subject to the provisions of the California Retail Sales Tax Act and that he is not required to take out a retail sales tax permit or to collect or pay the retail sales tax prescribed by the said Act. Your referee further concluded that this Court has exclusive jurisdiction

to determine the liability of this estate, or its trustee, for the payment of taxes and that, therefore, it should not require the trustee, in liquidating the assets of this estate, to collect and remit the sales tax prescribed by the aforesaid Act and then sue in the State Court to recover the same. Your referee concluded that such a course, even if this Court should authorize it, might result in hopeless confusion and might unreasonably delay the administration of this estate, for the reason that, if the trustee collected sales taxes from those to whom he sold the assets of [39] this estate and it was then determined that he was not liable for such taxes, he would, under California law, be obliged to refund the same to those from whom the taxes had been collected. Your referee, therefore, concluded that the trustee's petition for a restraining order should be granted and he thereupon made the order from which this review is taken.

Papers Submitted

I hand up for the information of the Court the following papers:

1. Trustee's petition for restraining order, filed August 28, 1941.
2. Order to show cause dated August 28, 1941.
3. Restraining order against the State Board of Equalization, dated September 19, 1941.

4. Petition for review, filed September 23, 1941.

Respectfully Submitted this 9th day of October, 1941.

BENNO M. BRINK

Referee in Bankruptcy

[Endorsed]: Filed Oct. 9, 1941. [40]

[Title of District Court and Cause.]

MEMORANDUM OPINION ON REVIEW OF
REFEREE'S ORDER OF SEPTEMBER 19,
1941.

The petition for review presents three questions:

1. Is the trustee in bankruptcy required to procure a permit from the State Board of Equalization before he can sell assets of a bankrupt estate to purchasers for use or consumption?

2. Is such trustee liable for a sales tax on all such personal property so sold?

3. Has the referee power to enjoin a state officer in the enforcement of a state statute?

Heretofore Judge McCormick of this court in the matter of California Pea Products, Inc., a corporation, Bankruptcy file No. 32615-C, in a well considered opinion answered the first two questions in

the negative and the third question in the affirmative. I concur in his conclusions, consequently, there is no occasion for me to cover the same ground covered by him.

However, I feel certain features of his opinion should be amplified.

The sales tax is imposed upon retailers for the privilege of selling tangible personal property at retail. It is therefore a tax for the privilege of selling and while the act contemplates the tax shall be passed on to the consumer, at the same time the retailer is the one that is liable therefor, (*Western Lithograph Co. v. State* [41] *Board of Equalization*, 78 Pac. (2d) 731, 117 A. L. R. 838). In other words, the State Board of Equalization seeks to enforce upon the trustee of a bankrupt estate, the necessity of obtaining a license from the State of California in order that he may perform his mandatory duties under the Bankruptcy Act, and as a further privilege of the continuance of the performance of his duties, to pay a sales tax to said Board.

In *Oklahoma v. Texas*, 266 U. S. 298, 301, the Court said:

“* * * In all that the receiver has done he has been the Court’s agent and representative. In operating the oil wells in the area in dispute he was not engaged in a business or pursuing an occupation in the ordinary acceptance of those terms, but as an officer of the Court was

conserving the property within that area for the benefit of those to whom it ultimately might prove to belong. The State recognizes that all this is true, and so does not seek to subject the receiver to the taxes described but only to have them paid out of the proceeds of the oil production which are in his hands and ready to be paid over to those for whose ultimate benefit the wells have been operated.”

It seems clear to me that a trustee cannot be classified as a retailer, nor can he be classified as one engaged in the business of selling personal property at retail under the above authority.

Furthermore, the Act further provides “Any person, firm, partnership, corporation, etc., engaged in the business of selling tangible personal property at retail is subject to the tax”. No provision is made for the payment of said tax by trustees in bankruptcy.

In the case of *Reinecke v. Gardner*, 277 U. S. 239, 241, I find the following language used: [42]

“As under the bankruptcy act the entire property of the bankrupt vested in the trustee, the income in question was not the income of the bankrupt corporation, but of the trustee and was subject to income and excess profits tax only if the statutes authorized the assessment of the tax against him.”

And again at page 242, the Court stated:

“* * * A tax imposed on corporations alone does not extend to a trustee in bankruptcy of a corporation. See *United States v. Whitridge*, 231 U. S. 144; *Scott v. Western Pacific Ry.*, 246 F. 545; compare *Smietanka v. First Trust & Savings Bank*, 257 U.S. 602.”

In adopting 28 USCA 124a, it would appear that Congress provided for the payment of state taxes when the trustee conducts the business of the bankrupt to clarify the liability of trustees for the payment of taxes, and by implication excluded the collection of additional taxes as herein attempted. (25 R.C.L. 981-3; *Scott v. Western Pac. Ry.* 246 F. 545).

Certainly the bankruptcy courts do not have to seek permission from the State of California in order to function in this state, nor pay a tax for so functioning. The state not only demands that the bankruptcy court pay for a permit to sell the assets of a bankrupt estate, but to pay 3% of the sales to the user or consumer of such articles sold. The bankruptcy court is not concerned whether the purchaser is a user or consumer or whether he is buying said personal property for resale. The state seeks to place the additional duty upon the trustee of ascertaining the future use of said personal property.

If a trustee must pay a tax to the State of California for the privilege of selling assets of a bankrupt estate, then he must also pay to the City of Los Angeles its license fee for the same privilege. If he is "doing business" within the purview of the state law, he is by the same reasoning "doing business" under the licensing ordinance of the [43] City of Los Angeles. To so hold would be a substantial surrender of the exclusive jurisdiction of the bankruptcy courts.

In arriving at my conclusions, I am not unmindful of the present trend of judicial decisions in their broadening of the base for sales tax purposes as reflected in *Bigsby v. Johnson*, 6 Cal. Dec. 212, and *State of Alabama v. King and Boozer* decided by the Supreme Court of the United States on November 10, 1941.

The said order of the Referee is hereby confirmed and the attorney for the trustee is directed to forthwith submit the necessary order for my signature.

Dated: Los Angeles, California, December 4, 1941.

BEN HARRISON

Judge

[Endorsed]: Filed 2 P.M. Dec. 4, 1941. R. S. Zimmerman, Clerk. By Murray E. Wire, Deputy Clerk.

[44]

In the District Court of the United States
Southern District of California
Central Division

In Bankruptcy No. 36,845-BH

In the Matter of

DAVIS STANDARD BREAD COMPANY,
A Corporation,

Bankrupt,

ORDER DENYING PETITION FOR REVIEW
AND AFFIRMING ORDER OF REFEREE

The petition of the State Board of Equalization for a review of the order of Referee Benno M. Brink entered herein, restraining and enjoining the State Board of Equalization of California from attempting to compel the trustee in bankruptcy, L. Boteler, to take out a sales tax permit or to collect a three per cent retail sales tax for the State of California from purchasers of assets of this bankrupt estate in sales made by the trustee in liquidation of the bankrupt estate and not made in the operation of the bankrupt's former business, having come on for hearing pursuant to notice, before the undersigned Judge of the above named court on November 17, 1941, at the hour of 10 o'clock, A. M., on said date, and the trustee appearing by his Attorneys Messrs. Frank C. Weller and William E. Woodroof, Thomas S. Tobin of counsel, and the State Board of Equalization appearing

by Earl Warren, Attorney General of the State of California and Alberta Belford, Deputy Attorney General, and said matter having been argued and briefs having been submitted, and the Court having considered the same,

Finds, that the trustee, L. Boteler, beginning with [45] the second day of his tenure of office as trustee, has been liquidating the assets of the bankrupt; that he has collected, paid, or assumed responsibility for sales tax on all items of merchandise sold by him at retail; that he is now selling and disposing of equipment and assets belonging to the bankrupt estate to purchasers at private sale for the purpose of liquidation and is not operating the business of the bankrupt and is not selling such material and equipment as remains in his possession, at retail, but is converting the same into cash under provisions of Section 47-a of the Bankruptcy Act, and that the State Board of Equalization is seeking to require the trustee to take out a retail sales tax permit and to collect a three per cent sales tax on assets sold by him in liquidating said bankrupt estate.

The Court concludes, as a conclusion of law, that the State of California, has no right to require a trustee in bankruptcy liquidating the assets of a bankrupt estate, to take out a license from the State of California to permit him to perform the functions and duties imposed upon him under the provisions of Section 47-a of the Bankruptcy Act (11 USCA, Section 75-a).

The Court further concludes that the State of California or the State Board of Equalization thereof may not impose a retail sales tax on property as described in the trustee's petition and the order of the Referee, being converted into cash by sales to purchasers at private sale for the purpose of liquidation, and that to permit the State of California to impose these requirements on a trustee in bankruptcy in the performance of his statutory duties, would be an unwarranted invasion of the jurisdiction of the Bankruptcy [46] Courts and an impairment of its functions.

The Court further concludes that the trustee is entitled to a restraining order for the purpose of protecting him in the proper administration of this bankrupt estate, and that the restraining order issued by the Referee against the State Board of Equalization of the State of California was justified and proper.

In consideration of the foregoing and no error appearing on the part of the Referee, and on motion of Messrs. Frank C. Weller and William E. Woodroof, Attorneys for the Trustee, Thomas S. Tobin of counsel, it is

Ordered that the petition of the State Board of Equalization of the State of California be, and the same hereby is denied, and the order of the Referee is hereby in all respects affirmed.

Done at Los Angeles, in the Southern District of California, this 12th day of December, 1941.

BEN HARRISON

United States District Judge.

[Endorsed]: Filed Dec. 12, 1941. [47]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Above Entitled Court; and to L. Boteler as Trustee in Bankruptcy of Davis Standard Bread Company, a Corporation, Bankrupt, and to Messrs. Frank C. Weller and William E. Woodroof, His Attorneys Herein:

Notice is hereby given that the State Board of Equalization of the State of California hereby appeals to the United States Circuit Court of Appeals, in and for the Ninth Circuit, for review of the order of the United States District Court, in and for the Southern District of California, Central Division, made and entered on the 12th day of December, 1941, restraining and enjoining the State Board of Equalization of the State of California, its servants and employees, from attempting to compel L. Boteler as Trustee in Bankruptcy of Davis Standard Bread Company, a corporation, Bankrupt, to procure a license as a retailer under the California Retail Sales Tax Act and from attempting to compel L. Boteler as Trustee in Bankruptcy of Davis

Standard Bread Company, a corporation, Bankrupt, to collect of purchasers a retail sales tax on sales of the assets of said bankrupt estate sold piecemeal to consumers and to pay the tax to the State Board of Equalization [48] of the State of California.

Dated: January 8, 1942.

EARL WARREN,

Attorney General of the
State of California

By ALBERTA BELFORD

Deputy Attorney General,
Attorneys for State Board
of Equalization of the
State of California

(Affidavit of service shows service by mail Jan. 8, 1942, on attorneys for the Trustee)

[Endorsed]: Filed Jan. 9, 1942, copy mailed to Trustee's Attys. 1/15/42. R. S. Zimmerman, Clerk.
E.L.S. [49]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Comes now the petitioner, State Board of Equalization of the State of California, by its attorneys, and files and presents to the court its Assignment of Errors whereby said petitioner assigns as error in the records and proceedings of the District Court of

the United States, Southern District of California, Central Division, the following particulars and errors:

(1) That the Court erred in affirming the order of the Referee in Bankruptcy restraining the State Board of Equalization from asserting any claim for retail sales tax under the provisions of the California Retail Sales Tax Act by reason of certain sales made by him as Trustee in Bankruptcy of the above entitled bankrupt estate;

(2) That the court erred in concluding that the sales made by L. Boteler as Trustee in Bankruptcy of certain assets belonging to the said bankrupt estate to purchasers at private sale for the purpose of liquidation were not retail sales within the meaning of the California Retail Sales Tax Act.

Dated: January 8, 1942.

EARL WARREN,

Attorney General of the
State of California,

By ALBERTA BELFORD,

Deputy Attorney General,
Attorneys for State Board of
Equalization of the State of
California.

[Endorsed]: Filed Jan. 9, 1942.

(Affidavit of service by mail on Attys. for Trustee Jan. 14, 1942) [50]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

Upon reading the Application for Appeal, and upon all of the records and files herein,

It is hereby ordered that an appeal be and the same is hereby allowed to the State Board of Equalization of the State of California to have the United States Circuit Court of Appeals, in and for the Ninth Circuit, review the order of the United States District Court, in and for the Southern District of California, Central Division, made and entered on the 12th day of December, 1941, restraining and enjoining said State Board of Equalization of the State of California, its servants and employees, from attempting to compel L. Boteler as Trustee in Bankruptcy of Davis Standard Bread Company, a corporation, Bankrupt, to procure a license as a retailer under the California Retail Sales Tax Act and to compel L. Boteler as said Trustee in Bankruptcy to pay a retail sales tax upon all sales made by him of the assets of said Davis Standard Bread Company, a corporation, Bankrupt.

It Is Hereby Further Ordered that citation be issued as provided by law and that a transcript of the record be prepared by the Clerk of the United States District Court [51] in and for the Southern District of California, Central Division, and transmitted to said United States Circuit Court of Appeals, in and for the Ninth Circuit, so that said

United States Circuit Court of Appeals, in and for the Ninth *Court*, shall have the same in said court within thirty (30) days from the 7th day of January, 1942.

It Is Hereby Further Ordered that cost bond in said appeal be and the same is hereby fixed at \$250.00, the Clerk to approve said bond.

Dated this 12th day of January, 1942.

PAUL J. McCORMICK

Judge of the United States District Court, acting and performing aforesaid duty in place of Judge Ben Harrison, who is unable to act by reason of sickness, under Rule 63, R. C. P.

[Endorsed]: Filed Jan. 12, 1942. [52]

The premium charged for this bond is \$10.00 Dollars per annum.

4542048

In the District Court of the United States,
For the Southern District of California,
Central Division

In the Matter of Davis Standard Bread Company,
a corporation,

Bankrupt,

L. Boteler, Trustee,

Respondent,

vs.

State Board of Equalization of the State of California,

Appellant.

COST BOND ON APPEAL

Know All Men by These Presents, That we, Fidelity and Deposit Company of Maryland, a corporation duly organized and doing business under and by virtue of the laws of the State of California and duly qualified for the purpose of making, guaranteeing or becoming surety upon bonds or undertakings required or authorized by the laws of the United States of America, as Surety, is held and firmly bound unto L. Boteler, Trustee of the Davis Standard Bread Company, a corporation, Bank-

rupt, in the penal sum of Two hundred fifty and no/100 (\$250.00) Dollars, to be paid to said L. Boteler, Trustee of the Davis Standard Bread Company, a corporation, Bankrupt, their heirs and assigns, for which payment well and truly to be made the Fidelity and Deposit Company of Maryland binds itself, its successors and assigns firmly by these presents.

Signed, sealed and dated this 13th day of January, 1942. [53]

The Condition of the Above Obligation Is Such That Whereas, the State Board of Equalization of the State of California, Appellant in the above entitled suit, is about to take an appeal to the United States Circuit Court of Appeals for the Ninth *District*, to reverse a decree made, rendered and entered on the 12th day of December, 1941, by the District Court of the United States for the Southern District of California, Central Division, in the above entitled cause, confirming an order made prior thereto by Benno Brink, Referee, and in favor of the Trustee and Respondent as in said decree set forth.

Now therefore, the condition of the above obligation is such that if the State Board of Equalization of the State of California, Appellant, shall prosecute their said appeal to effect and answer all costs which may be adjudged against them if they fail to make good their appeal, then this obligation

shall be void; otherwise to remain in full force and effect.

FIDELITY AND DEPOSIT
COMPANY OF MARYLAND

(Seal) By D. M. LADD

Attorney in Fact

Attest THERESA FITZGIBBONS

Agent

Examined and recommended for approval as provided in Rule No.

.....
Attorney

State of California,
County of Los Angeles—ss:

On this 13th day of January, 1942, before me, S. M. Smith, a Notary Public, in and for the said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared D. M. Ladd, known to me to be the Attorney-in-Fact, and Theresa Fitzgibbons, known to me to be the Agent of the Fidelity and Deposit Company of Maryland, the Corporation that executed the within instrument, and acknowledged to me that they subscribed the name of the Fidelity and Deposit Company of Maryland thereto and their own names as Attorney-in-Fact and Agent, respectively.

[Seal] S. M. SMITH

Notary Public in and for the County of Los Angeles, State of California.

My Commission expires Feb. 18, 1942.

I hereby approve the foregoing bond, dated the 15th day of January, 1942.

PAUL J. McCORMICK,
Judge.

[Endorsed]: Filed Jan. 15, 1942. [54]

[Title of District Court and Cause.]

DESIGNATION OF TRANSCRIPT

To the Clerk of the Above Entitled Court:

Pursuant to the appeal from the order of the above entitled court in the above entitled proceeding, which notice of appeal was filed on the 9th day of January, 1942, and order allowing appeal signed by the court and filed on the 12th day of January, 1942, you are hereby requested and instructed to certify to the United States Circuit Court of Appeals, in and for the Ninth Circuit, at San Francisco, California, by the 6th day of February, 1942, two certified copies of each of the following portions of the transcript of the record in the above entitled proceeding:

- (1) Petition in Bankruptcy;
- (2) Order of the court appointing L. Boteler as Trustee in Bankruptcy;
- (3) Petition of L. Boteler as Trustee in Bankruptcy for Injunction, addressed to Honorable Benno M. Brink, Referee in Bankruptcy, together

with Order to Show Cause issued upon said petition, served upon the State Board of Equalization of the State of California on September 2, 1941;

(4) Order of Benno M. Brink, Referee in Bankruptcy, [55] restraining the State Board of Equalization of the State of California from presenting its claim for retail sales tax, which order commences as follows:

“The petition of the trustee for a restraining order coming on for hearing before the undersigned Referee in Bankruptcy at his Court Room in the United States Post Office and Court House on the 15th day of September, 1941, at the hour of 2 o'clock, P. M. * * * .”;

(5) Petition of the State Board of Equalization of the State of California to the District Court of the United States, Southern District of California, Central Division, for Review of the Restraining Order of Benno M. Brink, Referee in Bankruptcy, dated September 18, 1941, and signed by J. J. Campbell, petitioner;

(6) Referee's Certificate on Petition for Review by State Board of Equalization, dated October 9, 1941, and signed by Benno M. Brink, Referee in Bankruptcy;

(7) Order of United States District Court, Southern District of California, Central Division, denying petition for Review and affirming the Order of the Referee, Benno M. Brink, dated December 12, 1941, and signed by Ben Harrison, United States District Judge;

(8) Notice of Appeal dated January 8, 1942;

(9) Order Allowing Appeal dated January 12, 1942; and

(10) Order Approving Appeal Bond.

Dated: January 14, 1942.

EARL WARREN,

Attorney General of the State
of California,

By ALBERTA BELFORD

Deputy Attorney General,
Attorneys for State Board
of Equalization of the State
of California, Appellant.

[Endorsed]: Filed 4:44 P.M. Jan. 15 1942. R. S. Zimmerman, Clerk. By M. M. Karcher, Deputy Clerk.

(Served by mail Jan. 14, 1942, on Attys. for Trustee as shown by affidavit.) [56]

[Title of District Court and Cause.]

SUPPLEMENTAL DESIGNATION
OF TRANSCRIPT

To the Clerk of the Above Entitled Court:

Pursuant to the appeal from the order of the above entitled court in the above entitled proceeding, which notice of appeal was filed on the 9th day

of January, 1942, and order allowing appeal signed by the court and filed on the 12th day of January, 1942, and supplemental and in addition to all of the transcript of the record hereinbefore designated, you are hereby requested and instructed to certify to the United States Circuit Court of Appeals, in and for the Ninth Circuit, at San Francisco, California, by the 6th day of February, 1942, two certified copies of the following document:

Order Adjudging Debtor Bankrupt, directing Bankruptcy be proceeded with, Referring said Cause to a Referee, Appointing a Receiver and Fixing Time and Place for Hearing of Trustee's Accounts and Reports and Applications for Fees, which order was signed by Judge Ben Harrison and filed on July 30, 1941.

Dated: January 23, 1942.

EARL WARREN,

Attorney General

By ALBERTA BELFORD,

Deputy.

Attorneys for State Board of
Equalization of the State of
California.

[Endorsed]: Filed Jan. 24, 1942.

(Served on Attys. for Trustee, Jan. 23, 1942, by mail. Service shown by affidavit.) [57]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the parties hereto, through their respective counsel, that the Order Appointing L. Boteler as Trustee in Bankruptcy of Davis Standard Bread Company, a corporation, Bankrupt, which order is a part of the records and files of the Referee in Bankruptcy in the above entitled proceeding, may with the approval of the above entitled court be incorporated in and made a part of the transcript of the record on appeal to the United States Circuit Court of Appeals, in and for the Ninth Circuit, which appeal was taken by the State Board of Equalization of the State of California from the order of the District Court of the United States, Southern District of California, Central Division, made and entered in the above entitled matter on December 12, 1941, affirming the order of Honorable Benno M. Brink, Referee in Bankruptcy, which order of said Referee in Bankruptcy enjoined and restrained the State Board of Equalization of the State of California from asserting any right against the said Trustee in Bankruptcy for retail sales tax for sales made by said Trustee after adjudication in bankruptcy.

Dated: January 23, 1942. [58]

FRANK C. WELLER and
WILLIAM E. WOODROOF,
By THOMAS S. TOBIN

Attorneys for L. Boteler as
Trustee in Bankruptcy
herein.

EARL WARREN,
Attorney General of the State
of California,
By ALBERTA BELFORD
Deputy Attorney General,
Attorneys for State Board
of Equalization of the State
of California.

The incorporation of the aforesaid document as a part of the transcript on appeal to the United States Circuit Court of Appeals, in and for the Ninth Circuit, in accordance with the foregoing stipulation, is hereby approved this 27th day of Jan., 1942.

PAUL J. McCORMICK,
Judge of the United States
District Court.

[Endorsed]: Filed Jan. 29, 1942. R. S. Zimmerman, Clerk. By, Deputy. [59]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, R. S. Zimmerman, Clerk of the District Court of the United States, do hereby certify that the foregoing pages numbered from 1 to 59 inclusive contain full, true and correct copies of Debtor's Petition; Order Adjudging Debtor Bankrupt; Order Approving Appointment of Trustee by Referee; Petition of Trustee for Restraining Order; Restraining Order by Referee; Petition for Review; Certificate of Referee on Review; Memorandum Opinion of District Judge; Order Denying Petition for Review and Affirming Order of Referee; Notice of Appeal; Assignment of Errors; Order Allowing Appeal; Cost Bond on Appeal; Order Approving Cost Bond on Appeal; Designation of Record on Appeal; Supplemental Designation; and Stipulation as to Record on Appeal, which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the fees of the clerk for comparing, correcting and certifying the foregoing record amount to \$16.40, which amount has been paid to me by Appellant.

Witness my hand and the seal of the said District Court this 5th day of February, A. D. 1942.

[Seal]

R. S. ZIMMERMAN,

Clerk,

By EDMUND L. SMITH

Deputy.

[Endorsed]: No. 10021. United States Circuit Court of Appeals for the Ninth Circuit. State Board of Equalization of the State of California, Appellant, vs. L. Boteler, Trustee in Bankruptcy of the Estate of Davis Standard Bread Company, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed February 7, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
In and for the Ninth Circuit

No. 10021

In the Matter of

DAVIS STANDARD BREAD COMPANY,
a Corporation,

Bankrupt.

APPELLANT'S DESIGNATION OF POINTS
ON APPEAL AND RECORD IN SUPPORT
THEREOF.

Appellant, State Board of Equalization of the State of California, hereby designates as "Appellant's Points on Appeal" those certain "Assign-

ments of Error", appearing at page 50 of the Original Certified Record, and Appellant hereby designates as the "Record on Appeal" all of the record heretofore certified to the United States Circuit Court of Appeals from the United States District Court in the above entitled cause.

Dated: February 20, 1942.

EARL WARREN,

Attorney General of the State
of California,

By ALBERTA BELFORD,

Deputy Attorney General,
Attorneys for Appellant.

State of California,

County of Los Angeles—ss.

C. R. Dusol, being first duly sworn, deposes and says:

That she is a citizen of the United States, resident of Los Angeles County, over eighteen years of age, not a party to the within cause, and employed as a clerk in the Los Angeles office of the Attorney General of the State of California, who is one of the attorneys for Appellant in the above entitled matter; that Messrs. Craig & Weller appears in said cause as attorney for Respondent L. Boteler and have offices at 111 W. Seventh St., Los Angeles, California; that in each of said places there is delivery service by United States mail, and between said two places there is regular communication by

mail; that affiant enclosed a copy of Appellant's Designation of Points on Appeal and Record in Support in an envelope addressed to said Messrs. Craig & Weller, 111 W. Seventh St., Los Angeles, California; that affiant sealed said envelope and deposited the same in the United States Post Office at Los Angeles, California, on the 20th day of February, 194....., with postage thereon fully prepaid.

C. R. DUSOL

Subscribed and sworn to before me this 20th day of February, 1942.

EARL WARREN,

Attorney General,

By ALBERTA BELFORD

Deputy Attorney General.

[Endorsed]: Filed Feb. 21, 1942. Paul P. O'Brien,
Clerk.

